Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1437

ALAN F. TAYLOR, *Petitioner,*

vs.

COMMISSIONER OF TAXATION AND FINANCE, JOHN J. CONNORS, E. ALLEN SMITH, AND F. COLBY, *Respondents,*

and

DAVID H. GUST, *Petitioner,*

vs.

JOHN J. CONNORS, *Respondent,*

and

DAVID H. GUST, *Petitioner,*

vs.

RONALD BRADSHAW, JR., *Respondent,*

and

DAVID H. GUST, *Petitioner,*

vs.

DAVID FIELDS, *Respondent.*

APPENDIX

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ORDER OF JUDGE BURKE DISMISSING COMPLAINT
(Taylor vs. Commissioner of Taxation et al.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALAN F. TAYLOR,

Plaintiff

- vs -

COMMISSIONER OF TAXATION AND FINANCE, JOHN J. CONNORS, E. ALLEN SMITH, and F. COLBY,

Defendants.

CIVIL 78-753

Plaintiff in person
242 South Union Street
Spencerport, N.Y. 14559

Donald P. Hirshorn and Robert T. Mulig
Assistant Attorneys General of New York
The Capitol
Albany, N.Y. 12224
Attorneys for defendants

The complaint herein was filed November 14, 1978. It seeks injunctive and declaratory relief and damages in the amount of $96,703.00.

By notice of motion with supporting papers filed December 21, 1978 the defendants move to dismiss the complaint on the ground that the complaint fails to state a cause of action on which relief can be granted under 42 U.S.C. Section 1983. The matter came on for argument on February 12, 1979 and was submitted for a decision.

Plaintiff, a New York State resident, has filed his New York income tax form upon which form plaintiff has asserted Fifth

Amendment privilege in lieu of supplying income information. A subsequent request by defendant Connors to supply income information was refused by plaintiff who again asserted Fifth Amendment privilege. Thereafter, on August 24, 1978, plaintiff was assessed a $950.00 penalty pursuant to Section 685(i) of the Tax Law for failure to file a return. By letter dated November 3, 1978 plaintiff requested a hearing which was denied. Thereafter he commenced this action.

John J. Connors has never been personally served.

The plaintiff has furnished no information to the State Tax Commission regarding his 1977 personal income. No claim is made by plaintiff that he did not have income nor does plaintiff dispute the fact that he is a New York State resident.

For the year 1977 the plaintiff filed a copy of the 1977 New York State tax return form, which contained the plaintiff's name, address, county of residence, social security number, occupation, signature and date. Plaintiff claimed the Fifth Amendment privilege against self-incrimination for the remainder of the tax return form. The filing of IRS form 1040 containing, as was done by the petitioner here, only the taxpayers name, social security number and a blanket declaration regarding his Fifth Amendment privilege does not constitute the filing of a tax return. U. S. vs. Sullivan, 274 U. S. 259 (1927).

Plaintiff relies upon Garner vs. U. S., 424 U.S. 648 (1976) in his claim of Fifth Amendment privilege. Garner does not change well established law as set forth in U. S. vs. Sullivan, 274 U.S. 259, holding that a citizen must file a tax return.

The plaintiff has made no showing of any reasonable ground for his refusal to file a return or answer any of the questions on the return other than his name and address. Although given a second opportunity to supply income figures for 1977, plaintiff refused to do so without explanation other than assertion of

Fifth Amendment privilege. The State Tax Department assessed against the plaintiff a $950.00 penalty pursuant to Section 685(i) of the State Tax Law. This action was proper based on the law and the facts.

Due process is safeguarded because a taxpayer has administrative remedies by which review may be had, Tax Law §689. Section 689(e) places the burden of proof of fraud with intent to evade tax upon the tax commission. Judicial review of the tax commission's determination is also available, Tax Law §690.

Under Section 689, a taxpayer may petition for redetermination of a deficiency or for a refund. The assessment demanded of plaintiff constituted a penalty for having failed to file a proper income tax return and cannot be deemed a deficiency assessment. Plaintiff's request for a hearing was disallowed because the proper procedure for plaintiff to follow was to pay the $950.00 penalty pursuant to the notice and demand dated August 24, 1978, and thereafter file a claim for a refund with the tax commission. If the refund claim is denied, the taxpayer may then file a petition for a hearing under Section 689.

Plaintiff has not alleged a federally protected right which has been violated by defendant or any state tax official. The Fifth Amendment privilege does not and should not extend to cases such as this where plaintiff has in effect failed to file a return. Due process is adequately safeguarded by the procedures set forth in the State Tax Law.

For the above reasons it is hereby

ORDERED that the complaint is dismissed.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

March 20, 1979.

ORDER OF JUDGE BURKE DISMISSING COMPLAINT
(Gust vs. Connors)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID H. GUST,

Plaintiff

- vs -

JOHN J. CONNORS,

Defendant

CIVIL 78-701

Plaintiff in person
399 Parma Center Road
Hilton, N.Y. 14468

Donald P. Hirshorn and Robert T. Mullig
Assistant Attorneys General of New York
The Capitol
Albany, N.Y. 12224
Attorney for defendant

By notice of motion with supporting papers filed December 20, 1978 defendant moves for an order pursuant to Rule 12(b) of the Federal Rule of Civil Procedure to dismiss the action on the grounds (1) that this court lacks jurisdiction over the person of the defendant, and (2) the complaint fails to state a cause of action upon which relief can be granted.

Plaintiff, a New York State taxpayer, submitted a New York tax form upon which plaintiff asserted Fifth Amendment privilege and failed to insert answers to the questions contained therein. On May 26, 1978, the New York State Department of Taxation and Finance, by John J. Connors, requested a complete list of all income earned for 1977. This information was not supplied.

Order of Judge Burke Dismissing Complaint
(Gust vs. Connors)

On July 20, 1978, plaintiff was assessed a penalty of $950.00 pursuant to the provisions of State Tax Law, §685(i). Thereafter, plaintiff commenced this action for alleged violation of civil rights in which he seeks damages in the amount of One Million Six Hundred Thousand dollars.

Defendant John J. Connors has never been personally served. The papers were served on a secretary to the Commissioner at the Department of Taxation and Finance, a person who is clearly unauthorized to accept service on behalf of the defendant.

Even assuming the service was proper, the complaint should nevertheless be dismissed. The plaintiff furnished no information to the State Tax Commission regarding his 1977 personal income. No claim is made by plaintiff that he did not have income nor does he dispute the fact that he is a New York State resident.

For the year 1977 the plaintiff filed a copy of the 1977 New York State Tax return form, which contained the plaintiff's name, address, county of residency, signature and date. He claimed the Fifth Amendment privilege against self incrimination for the remainder of the tax return form. The filing of IRS form 1040 containing, as was done by the plaintiff here, only the taxpayer's name, social security number and a blanket declaration regarding his Fifth Amendment privilege does not constitute the filing of tax returns. U. S. vs. Sullivan, 274 U.S. 259 (1927).

Plaintiff relies upon Garner vs. U. S., 424 U.S. 648 (1976), in his claim of Fifth Amendment privileges. Garner does not change well established law as set forth in U. S. vs. Sullivan, 274 U.S. 259, that a citizen must file a tax return.

Plaintiff has made no showing of any reasonable ground for his refusal to file a return or answer any of the questions on the return other than name and address. Although given a second

Order of Judge Burke Dismissing Complaint
(Gust vs. Connors)

opportunity to supply income figures for 1977, plaintiff refused to do so without explanation other than assertion of Fifth Amendment privileges. The State Tax Department assessed against plaintiff a $950.00 penalty pursuant to Section 685(i) of the State Tax Law. This action was proper based upon the law and the facts.

Due process is safeguarded because a taxpayer has administrative remedies by which review may be had, Tax Law section 689. Section 689(e) places the burden or proof of fraud with intent to evade tax upon the tax commission. Judicial review of the tax commission's determination is also available, Tax Law Section 690.

Plaintiff has not alleged a federally protected right which has been violated by defendant or any other state tax official. The Fifth Amendment privilege does not and should not extend to cases such as this where plaintiff has in effect failed to file a return.

For the above reasons it is hereby

ORDERED that the complaint is dismissed.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Court

March 16, 1979.

ORDER OF JUDGE BURKE DISMISSING COMPLAINT
(Gust vs. Fields)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID H. GUST,

Plaintiff

- vs -

DAVID FIELDS,

Defendant

CIVIL 79-16

Plaintiff in person
399 Parma Center Road
Hilton, N.Y. 14468

Robert Abrams
Attorney General of New York
The Capitol
Albany, N.Y.
Attorney for defendant

By notice of motion filed February 26, 1979 plaintiff moves for summary judgment in his favor. The motion was submitted for determination on March 12, 1979. On due consideration it is hereby

ORDERED that the motion is denied.

On the court's own motion the complaint is dismissed. The plaintiff furnished no information to the State Tax Commission regarding his personal income. The filing of IRS Form 1040 containing, as was done by the plaintiff here, only the taxpayer's name, social security number and a blanket declaration

regarding his Fifth Amendment privilege does not constitute the filing of tax returns. U. S. vs. Sullivan, 274 U. S. 259 (1927).

Plaintiff has not alleged a federally protected right which has been violated by defendant or any other state tax official. The Fifth Amendment privilege does not extend to cases such as this where plaintiff has in effect failed to file a return.

ALL OF THE ABOVE IS SO ORDERED.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

May 1, 1979.

ORDER OF JUDGE BURKE DISMISSING COMPLAINT
(Gust vs. Bradshaw, Jr.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID H. GUST,

Plaintiff

- vs -

RONALD BRADSHAW, JR.,

Defendant

CIVIL 78-826

Plaintiff in person
399 Parma Center Road
Hilton, N.Y. 14468

Robert Abrams
Attorney General of New York
The Capitol
Albany, N.Y.
Attorney for defendant
(Robert J. Mullig, Assistant Attorney General, of Counsel)

By notice of motion filed February 26, 1979 plaintiff moves for summary judgment in his favor. The motion was submitted for determination on March 12, 1979. On due consideration it is hereby

ORDERED that the motion is denied.

On the court's own motion the complaint is dismissed. The plaintiff furnished no information to the State Tax Commission regarding his personal income. The filing of IRS Form 1040 containing, as was done by the plaintiff here, only the taxpayer's name, social security number and a blanket declaration

Order of Judge Burke Dismissing Complaint
(Gust vs. Bradshaw, Jr.)

regarding his Fifth Amendment privilege does not constitute the filing of tax returns. U. S. vs. Sullivan, 274 U. S. 259 (1927).

Plaintiff has not alleged a federally protected right which has been violated by defendant or any other state tax official. The Fifth Amendment privilege does not extend to cases such as this where plaintiff has in effect failed to file a return.

ALL OF THE ABOVE IS SO ORDERED.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

April 27, 1979.

ORDER OF UNITED STATES COURT OF APPEALS SECOND CIRCUIT AFFIRMING DISTRICT COURT DECISION
(Gust against Bradshaw)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and seventy-nine.

Present:
Hon. William H. Mulligan
Hon. James L. Oakes
Hon. Murray I. Gurfein

Circuit Judges,

DAVID H. GUST,

Appellant,

-against-

RONALD BRADSHAW, JR.,

Appellee.

79-7390

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

Order of United States Court of Appeals
Second Circuit Affirming District Court Decision
(Gust against Bradshaw)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Harold P. Burke, Civ. 78-826 (W.D.N.Y. May 1, 1979).

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ JAMES L. OAKES
JAMES L. OAKES

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
☆DEC 19 1979☆
A. DANIEL FUSARO, CLERK

ORDER OF UNITED STATES COURT OF APPEALS
SECOND CIRCUIT AFFIRMING
DISTRICT COURT DECISION
(Gust against Fields)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and seventy-nine.

Present:
Hon. William H. Mulligan
Hon. James L. Oakes
Hon. Murray I. Gurfein

Circuit Judges,

DAVID H. GUST,

Appellant,

-against-

DAVID FIELDS,

Appellee.

79-7373

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

Order of United States Court of Appeals
Second Circuit Affirming District Court Decision
(Gust against Fields)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Harold P. Burke, Civ. 79-16 (W.D.N.Y. Apr. 27, 1979).

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ JAMES L. OAKES
JAMES L. OAKES

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
☆DEC 19 1979☆
A. DANIEL FUSARO, CLERK

ORDER OF UNITED STATES COURT OF APPEALS
SECOND CIRCUIT AFFIRMING
DISTRICT COURT DECISION
(Gust against Connors)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and seventy-nine.

Present:
Hon. William H. Mulligan
Hon. James L. Oakes
Hon. Murray I. Gurfein

Circuit Judges,

DAVID H. GUST,

Appellant,

-against-

JOHN J. CONNORS,

Appellee.

79-7279

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

Order of United States Court of Appeals
Second Circuit Affirming District Court Decision
(Gust against Connors)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Harold P. Burke, Civ. 78-701 (W.D.N.Y. Mar. 16, 1979).

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ JAMES L. OAKES
JAMES L. OAKES

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
☆DEC 19 1979☆
A. DANIEL FUSARO, CLERK

ORDER OF UNITED STATES COURT OF APPEALS SECOND CIRCUIT AFFIRMING DISTRICT COURT DECISION
(Taylor against Commissioner of Taxation et al.)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and seventy-nine.

Present:
Hon. William H. Mulligan
Hon. James L. Oakes
Hon. Murray I. Gurfein
Circuit Judges,

ALAN F. TAYLOR,
Appellant,

-against-

COMMISSIONER OF TAXATION AND FINANCE, JOHN J. CONNORS, E. ALLEN SMITH, AND F. COLBY,
Appellees.

79-7353

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

Order of United States Court of Appeals
Second Circuit Affirming District Court Decision
(Taylor against Commissioner of Taxation et al.)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Harold P. Burke, Civ. 78-753 (W.D.N.Y. Mar. 20, 1979).

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ JAMES L. OAKES
JAMES L. OAKES

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
☆DEC 19 1979☆
A. DANIEL FUSARO, CLERK